

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ADRIAN E. WHITAKER,

Plaintiff,

No. CIV S-04-1794 FCD GGH P

vs.

W.N. SADY, et al.,

Defendants.

ORDER

_____/

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983. On February 22, 2005, plaintiff filed a motion for summary judgment, wherein he indicates he served defendant Sady, the only remaining defendant,¹ with a summons via interdepartmental mail and that defendant has failed to provide an answer timely. Plaintiff's motion will be vacated, however, as he has not properly served the summons and complaint.

Fed. R. Civ. P. 4(e) provides that service upon individuals within a judicial district from whom a waiver of service has not been obtained may be made by personal service or pursuant to the law of the state in which the district court is located. Because plaintiff did not personally serve defendant Sady, he was required to satisfy California service rules.

¹ By order filed on March 28, 2005, the California Department of Corrections and Folsom State Prison were dismissed as defendants from this action.

1 Although California law permits service of a summons by mail, such service is
2 valid only if a signed acknowledgment is returned and other requirements are complied with.
3 Cal. Code Civ. Pro. § 415.30.² Plaintiff did not comply with the requirements of § 415.30
4 because he attempted service by interdepartmental mail and failed to otherwise comply with the
5 requirements contained in § 415.30 (see footnote, which sets forth this code section in relevant
6 part). Plaintiff will be afforded one additional opportunity to serve defendant properly.

7 Accordingly, IT IS ORDERED that:

8 1. Plaintiff's inappropriate motion for summary judgment, filed on February 22,
9 2005, is vacated from the court's calendar;

10 2. Plaintiff must, within sixty days, serve process upon defendant Sady; failure to
11 do so will result in a recommendation of dismissal of this action for plaintiff's failure to serve the
12 only remaining defendant in a timely manner, pursuant to Fed. R. Civ. P. 4(m).

13 3. As directed in the court's January 12, 2005 order, plaintiff must serve
14 defendant with a copy of the January 12, 2005 order together with the summons and a copy of the
15 complaint; plaintiff must also include a copy of this order, wherein the deadlines as set forth in
16 the January 12, 2005 order, are hereby extended to run from the date of this order; and

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19 ² Cal. Civ. Pro. Code § 415. 30 provides:
20 "(a) A summons may be served by mail as provided in this section. A copy of the summons and
21 of the complaint shall be mailed (by first-class mail or airmail, postage prepaid) to the person to
22 be served, together with two copies of the notice and acknowledgment provided for in
23 subdivision (b) and a return envelope, postage prepaid, addressed to the sender.

24 (b) The notice specified in subdivision (a) shall be in substantially the following form:
(Title of court and cause, with action number, to be inserted by the sender prior to mailing)

25 NOTICE

26 To: (Here state the name of the person to be served.)

This summons is served pursuant to Section 415.30 of the California Code of Civil Procedure.
Failure to complete this form and return it to the sender within 20 days may subject you (or the
party on whose behalf you are being served) to liability for the payment of any expenses incurred
in serving a summons upon you in any other manner permitted by law... [T]his form must be
signed by you personally or by a person authorized by you to acknowledge receipt of summons.
Section 415.30 provides that this summons is deemed served on the date of execution of an
acknowledgment of receipt of summons."

1 4. The Clerk of the Court is directed to re-issue and re-send plaintiff one
2 summons, for defendant Correctional Officer W. N. Sady. See docket entry No. 9. The Clerk
3 shall also send plaintiff one copy of the complaint, filed on August 27, 2004, and one copy of the
4 form "Consent to Proceed Before United States Magistrate Judge" with this order.

5 DATED: 4/20/05
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7 /s/ Gregory G. Hollows

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9 GREGORY G. HOLLOWS
10 UNITED STATES MAGISTRATE JUDGE

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